No. 83-906

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD W. (DICK) RYLANDER, SR.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSEPH F. HARBISON, III
OF THE FIRM OF
MATHENY, POIDMORE & SEARS
Counsel of Record

TIMOTHY P. MURPHY,
Attorney

MATHENY, POIDMORE & SEARS
A Professional Corporation
2100 Northrop Avenue
P.O. Box 13711
Sacramento, CA 95853-9990
Tele: 916 929-9271

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-906

UNITED STATES OF AMERICA, PETITIONER

V.

RICHARD W. (DICK) RYLANDER, SR., RESPONDENT

MOTION FOR LEAVE TO

PROCEED

IN FORMA PAUPERIS

LAW OFFICES
MATHENY, POIDMORE & SEARS
A PROFESSIONAL CORPORATION
2100 NORTHROP AVENUE
POST OFFICE BOX 13711
SACRAMENTO, CALIFORNIA 95853-9990

Petitioner, RICHARD W. RYLANDER, SR., pursuant to Rule 46 and 18 U.S.C. §3006A(d)(6), asks leave to file the attached Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without pre-payment of costs, and to proceed in forma pauperis. Petitioner was represented by appointed counsel, JOSEPH F. HARBISON, III, in the District Court and on appeal to the United States Court of Appeals for the Ninth Circuit.

JOSEPH F. HARBISON, III, as a member of the Federal Defenders Panel for the Eastern District, represented petitioner in the Federal District Court action No. CR-S-80-44 LKK (criminal contempt) which corresponds to the Ninth Circuit Docket Nos.

80-1813, 80-1702, and 80-1703. The 9th Circuit decision in that case is the subject of the Solicitor General's petition to this Court for a Writ of Certiorari, Case No. 83-906. Further, petitioner was represented by the same attorney, myself, in District Court Case No. CS-79-570 and CS-79-571 (civil contempt) which corresponded to the 9th Circuit Docket Nos. 80-4594 and 80-4595 which resulted in the previous United States Supreme Court Case No. 81-1120, decided by this Court on April 19, 1983. Petitioner proceeded in forma pauperis on that appeal by previous District Court Orders, and appointment by the United States Supreme Court.

DATED: January 4, 1984

Respectfully submitted,

MATHENY, POIDMORE & SEARS

By: _____
JOSEPH F. HARBISON, III
P.O. Box 13711
Sacramento, CA 95853-9990

LAW OFFICES
MATHENY, POIDMORE & SEARS
A PROFESSIONAL CORPORATION
2100 NORTHROP AVENUE
POST OFFICE BOX 13711
SACRAMENTO, CALIFORNIA 95853-9990

LAW OFFICES
MATHENY, POIDMORE & SEARS
A PROFESSIONAL CORPORATION
2100 NORTHROP AVENUE
POST OFFICE BOX 13711
SACRAMENTO, CALIFORNIA 95853-9980

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MATHENY, POIDMORE & SEARS
A PROFESSIONAL CORPORATION
2100 NORTHROP AVENUE
POST OFFICE BOX 13711
SACRAMENTO, CALIFORNIA 95853-9990

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A PROFESSIONAL CORPORATION
2100 NORTHROP AVENUE
POST OFFICE BOX 13711
SACRAMENTO, CALIFORNIA 95853-9990

SUMMARY OF ARGUMENT

Respondent contends that the petition for a Writ of Certiorari in this matter should be denied because: 1) a conviction of criminal contempt will only lie where the alleged contemnor has willfully and contumaciously refused to comply with the underlying order. Since the contemnor's ability to comply is an essential element of the offense which must be proven beyond a reasonable doubt, the prosecution must prove he had the ability to comply at the time specified in the order. In this case, the prosecution failed to prove that fact beyond a reasonable doubt at the time of trial; 2) the government cannot skirt this proof requirement by making reference to a prior proceeding where the issue was neither raised nor proven; 3) there is no indication in the record that respondent was informed of the nature of the charges and possible penalties, nor made a knowing and intelligent waiver of the right to counsel. Therefore, if petitioner's view is followed, the entire basis on which the freedoms of this society are based would be reversed in that a defendant charged with a crime would have the burden of proving his innocence as opposed to the prosecution carrying the burden to prove his guilt beyond a reasonable doubt.

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MATHENY, POIDMORE & SEARS
A PROFESSIONAL CORPORATION
2100 NORTHROP AVENUE
POST OFFICE BOX 13711
SACRAMENTO, CALIFORNIA 95853-9990

STATEMENT OF THE CASE

On January 4, 1979, the Internal Revenue Service (IRS) issued administrative summonses directing respondent, in his capacity as a corporate officer to appear, produce documents, and testify regarding the tax liability of two corporations. Respondent did not comply and the IRS sought court enforcement.

The District Court issued orders on November 19 & 20, 1979 directing respondent to appear before the court on January 14, 1980 and show cause why the summonses should not be enforced. Respondent did not appear at the hearing, but returned the orders to the court with a letter explaining that he was not an officer of the corporation.

The court heard the government's offer of proof on the issues of personal jurisdiction and whether the documents were already in the IRS's possession. Respondent's ability to comply with the summonses was never raised.[1)] Thereafter the District Court issued its order requiring respondent to appear and produce the records on February 4, 1980.

Respondent did appear on that date but did not bring the requested records. After being advised of his rights, respondent claimed he did not have the records. He declined to answer any questions.

The District Court then issued orders requiring respondent to show cause why he should not be held in contempt for failure to produce the records. At one point, respondent's son again wrote the court and, quoting from respondent, indicated that respondent did not have the requested records and could not produce

them.

The court appointed counsel to represent respondent on two occasions prior to the contempt trial. Respondent dismissed both counsel and filed a demand with the court for the appointment of "competent" counsel. The court left respondent with the choice of representing himself, hiring private counsel, or continuing with one of the two appointed counsel. Mr. Rylander would not expressly waive his right to counsel and demanded representation as late as the day of trial. Respondent was left with representing himself.

Respondent demanded a jury trial. The court refused because it specified that any penalty imposed would not exceed six (6) months imprisonment or a $500 fine.

A combined civil and criminal contempt trial was conducted on October 8, 1980. Respondent appeared but did not participate. The government's evidence established that the corporations had not been dissolved and that respondent had signed documents and conducted business prior to 1980. The government did not offer any proof of respondent's actual possession of the records, or their existence. However, the government's evidence did establish that respondent had repeatedly denied possessing the records.

LAW OFFICES
MATHENY, POIDMORE & SEARS
A PROFESSIONAL CORPORATION
2100 NORTHROP AVENUE
POST OFFICE BOX 13711
SACRAMENTO, CALIFORNIA 95853-9990

LAW OFFICES
MATHENY, POIDMORE & SEARS
A PROFESSIONAL CORPORATION
2100 NORTHROP AVENUE
POST OFFICE BOX 13711
SACRAMENTO, CALIFORNIA 95853-9990

Reasons For Denying The Petition

1. To understand the 9th Circuit's decision in this matter, one must begin by distinguishing civil and criminal contempt. The key determinant is the intended effect of the court's punishment. Punishment for civil contempt is usually intended to be remedial. That is, to induce compliance with the court's order. Whereas the intent of punishment for criminal contempt is punitive, to vindicate the authority of the court. United States v. Powers, 629 F.2d 619,627 (9th Cir.1980).

This distinction bears on the issues that are relevant at the time of trial. Whereas punishment for civil contempt must be lifted upon compliance with the underlying order. This is not true for criminal contempt. See United States v. Powers, supra, 629 F.2d at 627. Therefore, the alleged contemnor's ability to comply with the underlying order is relevant at each step of the civil contempt proceeding. The civil contempt punishment will not be imposed against one who connot comply with the order. See Maggio v. Zeitz, 333 U.S.56,75(1948).

However, in a criminal contempt proceeding, the alleged contemnor's ability to comply with the order is relevant only at the time specified for compliance. If he has the ability to comply with a valid court order and fails to do so, he is guilty. The fact that he may later be rendered unable to comply is irrelevant. Therefore, a defense based on inabilty to comply raised in a criminal contempt proceeding must focus on the compliance time specified in the order. This is the only manner in which the defense can be raised. However, the government would have

this Court rule the defense is completely unavailable simply because respondent did not appear at the summons enforcement hearing.

A conviction of criminal contempt will only lie where the alleged contemnor has willfully and contumaciously refused to comply with the underlying order. United States v. Joyce, 498 F.2d 592,596 (7th Cir.1974). It is an elementary conclusion that one who is unable to comply with a court order cannot wilfully disobey it. Therefore, the contemnor's ability to comply is an element of the offense which must be proven by the applicable standard of proof --- beyond a reasonable doubt. See United States v. Powers, supra, 629 F.2d at 626,n.6.

The government utterly failed to demonstrate respondent's ability to comply with the summons. It succeeded only in producing evidence that he was president of the subject corporations. There was no proof that the sought records ever existed or were ever in respondent's possession; nor were any facts reflecting on respondent's ability to comply proven at the enforcement hearing. The government made only the minimal showing of materiality and relevance required by United States v. Powell, 379 U.S.49(1964). The government proceeded by way of an offer of proof and the issue of respondent's ability to comply with the order was never tendered to the court.

2. It is a fundamental principle of due process that one cannot be convicted of a crime unless there is evidentiary proof of each element of the crime. Garner v. Louisiana, 368 U.S.157, 163-65(1961). Ability to comply is an element of criminal contempt by virtue of the "willfullness" requirement. The 9th Circuit has

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MATHENY, POIDMORE & SEARS
A PROFESSIONAL CORPORATION
2100 NORTHROP AVENUE
POST OFFICE BOX 13711
SACRAMENTO, CALIFORNIA 95853-9990

simply held that the government cannot skirt this proof requi
ment by making reference to a prior proceeding where the issu
was neither raised nor proven.

While the defendant may have a burden of production re
garding his ability to comply, that requirement was satisfied
evidence of respondent's denials of possession was presented
the contempt trial. This created an issue of fact and there
no evidence introduced to demonstrate respondent did have the
ability to comply. The only conclusion the fact finder could
reach is that respondent was unable to comply with the order.

3. The Sixth Amendment right to counsel is fundamenta
and is applicable in criminal contempt proceedings. Richmond
Black Police Officers v. City of Richmond, 548 F.2d 123 (4th
1977). The defendant must be personally advised of the nature
the charges and possible penalties. See Farelta v. Californi
422 U.S.806,818-19 (1975).

If the defendant is to make a knowing and intelligent
waiver of his right to counsel, the defendant must be apprised
of the nature of the charges and their penalties. Without suc
information, he cannot make such a waiver United States v. H
683 F.2d 322,324 (9th Cir.1982), because his decision will not
be knowing and intelligent.

Here the record does not reflect that respondent was so
informed. The fact that other court records may have so infor
him is irrelevant. If a waiver is knowing and intelligent, th
accused must be fully informed of the charges at the time of t
purported waiver.

Though the court found respondent had indeed made a

LAW OFFICES
MATHENY, POIDMORE & SEARS
A PROFESSIONAL CORPORATION
2100 NORTHROP AVENUE
POST OFFICE BOX 13711
SACRAMENTO, CALIFORNIA 95813-9990

knowing and intelligent waiver, this finding is belied by the lack of evidence to support it. There is no indication in the record that respondent was informed of the nature of the charges and possible penalties. The finding is therefore irrelevant.

CONCLUSION

If petitioner's contentions are followed in this case, defendants in criminal contempt proceedings would be put to the task of proving their innocence beyond a reasonable doubt, instead of the government being put to the task to prove the criminal contempt conviction with sufficient evidence to establish proof beyond a reasonable doubt.

Further, in the case at bar, defendant was denied his Sixth Amendment right to counsel as the record does not indicate a knowing and intelligent waiver of counsel and demonstrate an understanding of the charges and possible penalties with which he was faced. In essence, at no point in either the summons enforcement or the trial did the government ever prove that defendant had the ability to comply with the court's order, therefore there is insufficient proof to find that he willfully violated such a court order.

DATED: January 4, 1984

MATHENY POINDMORE & SEARS

By: _____
JOSEPH F. HARBISON, III

_____
TIMOTHY P. MURPHY
Attorney at Law

LAW OFFICES
MATHENY, POINDMORE & SEARS
A PROFESSIONAL CORPORATION
2100 NORTHROP AVENUE
POST OFFICE BOX 13711
SACRAMENTO, CALIFORNIA 95853-9990

LAW OFFICES
MATHENY, POIOMORE & SEARS
A PROFESSIONAL CORPORATION
2100 NORTHROP AVENUE
POST OFFICE BOX 13711
SACRAMENTO, CALIFORNIA 95813-8990

END NOTES

1) In point of fact, none of the summonses should have ever been enforced by the court since they were issued during a criminal investigation in violation of defendant's rights. During Mr. Rylander's recent trial, District Court No. CR-S-82-50, 9th Circuit Docket No. 82-1627, Agent George Ogihara testified as follows:

CROSS-EXAMINATION

BY MR. HARBISON:

Q. Mr. Ogihara?

A. Yes, sir, that's correct.

Q. Correct Pronunciation?

A. That's correct, sir.

Q. I understand from your direct testimony, the first time you actually met Mr. Rylander was in Attorney Alvin Wohl's office on September 26, 1978?

A. That's correct.

Q. When, in fact, were you appointed to this case, meaning the Rylander case?

A. I was appoint -- assigned the case to jointly investigate the matter sometime in the summer of '78. I think around June. June of '78.

Q. Okay. Do you recall testifying in a court trial of October 8th, 1980 in this District. Eastern District in front of Judge Karlton?

A. Yes, I do.

Q. Okay, and I believe that's the same date you gave

at that time was June of 1978. Do you know when Agent VanDenBerg was appointed to this case?

A. I do not, sir.

Q. Was she appointed prior to the time that you were appointed?

A. The first indication I had that she and I were to investigate jointly was a receipt of an order from chief of examinations, San Francisco District so designating us as a joint investigation of the case.

Q. When you say a joint investigation, you mean yourself as a revenue agent and a special agent from the Criminal Investigative Division, do you not?

A. That's correct.

Q. And isn't it I.R.S. procedure when they are conducting a criminal investigation to appoint both a special agent such as Joan VanDenBerg and a revenue agent such as yourself?

A. I -- in this particular case, umm, I did not refer the case; it was assigned to me as a joint investigation and I had no information whatsoever as to the background of the case.

Q. Okay. I'm asking you in general, is it not the I.R.S.'s procedure when they are conducting a criminal investigation to appoint a special agent from the Criminal Investigative Division and assign to that agent, to assist that agent, a

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POST OFFICE BOX 13711
SACRAMENTO, CALIFORNIA 95853-9990

revenue agent such as yourself? Isn't that the procedure?

A. That's correct, but it's essentially -- the return was assigned to me. That's the internal procedures.

Q. Okay. Was there any doubt in your mind that Agent VanDenBerg was a criminal investigator?

A. No, sir.

Q. And was there any doubt in your minds that what you were conducting and assisting her in was, in fact, not a civil investigation, but a criminal investigation?

A. Well, at the time, that determination was not made. So, put it this way, I didn't know how it was going to turn out.

Q. And Mr. Ogihara, do you remember giving this testimony -- and again, I'm quoting from the reporter's transcripts of a trial date of October 8th, 1980, Eastern District in front of Judge Karlton.

The court asked you: "Mr. Ogihara, you indidated your function being present was to be as a witness to the proceedings?" Answer: "That's true, sir." Question by Judge Karlton: "You were not there because you were conducting a special separate and civil investigation?" Answer: "That's correct, sir." Question by the judge: "It's correct that you were not?"

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A PROFESSIONAL CORPORATION
2100 NORTHROP AVENUE
POST OFFICE BOX 13711
SACRAMENTO, CALIFORNIA 95853-8860

Answer: "That's correct, that I was not."
Question: "How do you know that Miss VanDenBerg was conducting a criminal investigation? Did she tell you that?"
Answer: "No, sir, that -- I received a notification from San Francisco District sometime in late '78 that I was to assist Miss VanDenBerg." Question by the judge: "and that characterized it as a criminal investigation?" Answer: "It was characterized as such, yes, sir, that's correct."
Question: "You received this notification from where?" And you went on to say "District Office."
So when you testified back in 1980, there was no doubt in your mind that what you were involved in was a criminal investigation?

A. Potentially, it may lead to one.
Q. Potentially, it may lead to one?
A. Yes, sir, that's correct.
Q. We are here today, aren't we?
(No response.)

See also Agent Joan VanDenBerg's testimony, pages 271 through 323 wherein the IRS Agent initially refused to honor the court subpoena to testify at trial, and then upon appearing, claimed to have suffered a nervous breakdown and was unable to recall any of her previous testimony, and specifically the numerous

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A PROFESSIONAL CORPORATION
2100 NORTHROP AVENUE
POST OFFICE BOX 13711
SACRAMENTO, CALIFORNIA 95853-9990

times that she claimed to be conducting a civil investigation when in fact she was conducting a criminal investigation.

LAW OFFICES
MATHENY, POIDMORE & SEARS
A PROFESSIONAL CORPORATION
2100 NORTHROP AVENUE
POST OFFICE BOX 13711
SACRAMENTO, CALIFORNIA 95853-9990

LAW OFFICES
MATHENY, PODMORE & SEARS
A PROFESSIONAL CORPORATION
2100 NORTHROP AVENUE
POST OFFICE BOX 13711
SACRAMENTO, CALIFORNIA 95813-9990

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

I am a resident of the county aforesaid; I am over the age of eighteen (18) years and not a party to the within entitled action; my business address is 2100 Northrop Avenue, Sacramento, CA 95825.

On January 5, 1984, I served the within OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

Supreme Court of the United States
Washington, D.C. 20543

Pursuant to Rule 28, all parties required to be served, have been served.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 5, 1984 at Sacramento, CA.

Kaye Curtin

KAYE CURTIN